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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICELAND FOODS, INCORPORATED,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO-CLC, LOCAL 2381, AND UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the arbitrator's award draws its essence from the collective bargaining agreement between the parties.

2. Whether enforcement of the arbitrator's award contravenes a well defined and dominant public policy.

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STATEMENT OF THE CASE

Riceland Foods, Inc., implemented a safety program on March 7, 1980, involving use of facial respirators, to become effective on April 1, 1980, because of an ammonia leak which had occurred in one of its departments the previous August. The employer also implemented work rules pursuant to this program requiring employees to be clean shaven when using the facial respirators, in order to achieve a secure fit of the facial mask. The work rules further provided that employees who refused to shave their beards before using the respirators, and who refused alternative transfer to other departments, would be subject first to suspension and ultimately discharge for such refusal.

Regulations of the Occupational Health and Safety Administration then in effect regarding respirator use, 29 CFR 1910.134(e)(5)(i), provided that a facial beard, among other conditions, "may" prevent a secure fit of the respirator face mask, under certain circumstances. These regulations, however, unlike the employer's work rules on respirator use, did not prohibit outright the use of a respirator mask by a person with a beard.

Several employees refused to comply with the employer's work rules regarding beards and respirator use, and the employer fired them on April 7, 1980. Previously, on March 21, 1980, one of the grievants, who was then president of the local union, attempted to file a grievance challenging the shaving requirement of the respirator program, but the employer rejected the grievance as being premature, inasmuch as the program was not to be implemented until April 1, 1980.

Respondent union processed grievances on behalf of the discharged employees, which were heard by an arbitrator on July 24, 1980. The contract terms relevant to the authority of the arbitrator in discipline cases provide that:

> . . . [A]ny arbitration with respect to the exercise of a right to discharge or discipline under the provisions of Article 7 shall be limited to the question of whether or not there was just cause or whether or not the working

rules were violated, and shall not include whether or not the type of discipline selected was appropriate.

The arbitrator ruled that the company did not have just cause for discharging the grievants, because of his conclusion that the employer's work rule forbidding respirator use with a facial beard was invalid, as being unsupported by adequate investigation and research, and unrequired by applicable federal regulations.

The employer filed suit in federal district court on September 29, 1980, seeking to have the award of the arbitrator vacated, as being in excess of authority conferred upon him by the collective bargaining agreement. Respondent union counterclaimed for enforcement of the award, and after cross-motions for summary judgment, the district court ruled for respondent, and dismissed the employer's complaint. The employer appealed, and on June 27, 1984, a three-judge panel of the Court of Appeals for the Eighth Circuit reversed the district court and vacated the arbitrator's award. The full court of appeals granted rehearing *en banc,* and on December 10, 1984, by an equally divided vote, the court *en banc* upheld the decision of the district court. The employer's petition followed.

ARGUMENT

I. The petition for writ of certiorari should be denied because the decision below is fully in accord with previous rulings of this court.

The decision of the court below is consistent in all respects with definitive decisions of this Court, and petitioner's arguments to the contrary are merely a plea for more judicial review of an already fully considered record. Petitioner seeks review of a lower court decision which turns solely upon an analysis of the particular facts presented, and upon construction of the collective bargaining agreement between these parties. Factual review and analysis have never justified discretionary issuance of the writ of certiorari. *See, N.L.R.B.* v. *Hendricks Co., Etc.*, 454 U.S. 170, 176 n. 8, 102 S. Ct. 216, 222, 70 L. Ed. 2d 323 (1981); *Rudolph* v. *United States,* 370 U.S. 269, 82 S. Ct. 1277, 8 L. Ed. 2d 484 (1962); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924).

The single issue fully litigated and judicially reviewed below was whether the district court properly enforced a labor arbitration award, pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Controlling standards for determining this issue are well-established, and were properly applied below. A federal court may not overrule an arbitrator's decision simply because the court prefers its own interpretation of the labor agreement to that of the arbitrator chosen by the parties. *W. R. Grace & Co.* v. *Local Union 759,* 461 U.S. 757, 764, 103 S. Ct. 2177, 2182, 76 L. Ed. 2d 298 (1983); *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596, 80 S. Ct. 1358, 1360, 4 L. Ed. 2d 1424 (1960). When parties include an arbitration clause in a collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. If the arbitrator's decision "draws its essence from the collective bargaining agreement," *Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597, 80 S. Ct. at 1361, a reviewing federal court must enforce the award and is not entitled to review the merits

of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. *W. R. Grace & Co., supra,* 461 U.S. at 764, 103 S. Ct. at 2182. "Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation." *Id.*, at 765, 103 S. Ct. at 2183.

The decisions below do not depart from these controlling standards. The arbitrator construed the contract to mean that the grievants could not be discharged for "just cause", within the meaning of Article 4, Section 6, of the contract, for violation of an *invalid* work rule. In addition, because the grievants refused to comply with the invalid work rule, instead of protesting it in the grievance procedure, the arbitrator mitigated the remedy afforded to the grievants to provide for reinstatement with a layoff and forfeiture of pay for a period of one month. The arbitrator thus concluded that the contract, quite apart from limiting his authority to reduce discipline for established violations, did not likewise limit his authority to examine the reasonableness of management's *work rules,* pursuant to a broader contractual authority to determine the existence of "just cause" for discipline of any kind, including discharge. Whatever the merits of the arbitrator's interpretation, and respondents submit that it is clearly a correct one, it most certainly cannot be said with "positive assurance," *Kewanee Machinery Division* v. *Teamsters Local No. 21,* 592 F. 2d 314, 318 (8th Cir. 1979), that the arbitrator's interpretation fails to "draw its essence" from the bargaining agreement. *Enterprise Wheel & Car, supra,* 363 U.S. at 597, 80 S. Ct. at 1361.

Respondents consider the arbitrator's interpretation to be a correct one, but even if the interpretation is incorrect, it is deserving of judicial deference and enforcement, in accordance with controlling standards established by this Court. The courts below correctly adhered to those standards.

> Regardless of what our view might be of the correctness of [the arbitrator's] contractual interpretation,

> the Company and the Union bargained for that interpretation. A federal court may not second guess it.

Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. at 599, 80 S. Ct., at 1362.

Accordingly, the decision below correctly affirmed enforcement of the arbitrator's award, in accordance with controlling decisions of this Court.

II. The petition for writ of certiorari should be denied because the decision of the court below, affirming enforcement of an arbitration award, will not inappropriately affect public policy.

The arbitration decision enforced below, contrary to petitioner's contentions, does not compel the employer to violate the Occupational Safety & Health Act. A court may not, of course, enforce a collective bargaining agreement, or any contract, that is contrary to public policy. *Hurd* v. *Hodge*, 334 U.S. 24, 34-35, 68 S. Ct. 847, 852-53, 92 L. Ed. 1187 (1948). Public policy considerations, in the context of contract enforcement, are determined by the courts, rather than by arbitrators. *See, International Brotherhood of Teamsters* v. *Washington Employers, Inc.*, 557 F. 2d 1345, 1350 (9th Cir. 1977); *Local 453* v. *Otis Elevator Co.*, 314 F. 2d 25, 29 (2d Cir. 1963).

> Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany* v. *United States*, 324 U.S. 49, 66, 65 S. Ct. 442, 451, 89 L. Ed. 744 (1945).

W. R. Grace v. *Rubber Workers, supra*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183.

The decision of the arbitrator, enforced by the district court, imposed no constraints on the employer with respect to future compliance with the Occupational Safety & Health Act and its implementing regulations, nor did it mandate unrestrained future use of respirators by bearded employees. The arbitrator specifically disclaimed any such

intention (App. 38), and focused instead on construction and application of the contractual standard of just cause, rather than upon formulation of work rules for future respirator use.

The only action required of the employer by the arbitrator's decision is reinstatement of the discharged grievants with backpay, except for a layoff of one month's duration. The employer remains free to adopt any reasonable work rule it deems fit regarding future respirator use. Such rules are likely to be approved in future arbitration proceedings, so long as their propriety is factually established. The employer simply did not make the requisite production of proof in the instant case.

In summary, the arbitrator correctly concluded that the contractual standard of just cause for discharge could not sustain termination of the grievants for violation of a work rule flatly prohibiting respirator use with a beard, when federal regulations simply provided that a beard "may" prevent proper respirator use, and the employer failed to otherwise establish, by a preponderance of evidence, the reasonableness of so stringent a work rule. Although the employer produced deposition testimony, in support of a motion for summary judgment in the district court, that it is the "policy of OSHA" to find violations where respirators are used by bearded employees (Pet. Brief at 9), the record does not disclose the authoritative source of the "policy" described by the agency witness, does not reveal when it became effective, nor explain why equally "official" agency regulations, stating simply that a beard "may" prevent a proper respirator fit, would invariably require such sanctions.

The record simply does not reveal a "well defined and dominant" public policy, ascertainable "by reference to the laws and legal precedents and not from general considerations of supposed public interests," *W. R. Grace* v. *Rubber Workers, supra,* 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, and the testimony of the OSHA official, in any event, was not produced in the arbitration proceeding. Pet. Brief at 9.

III. The petition for writ of certiorari should be denied because the decision below is not in conflict with

decisions of other courts of appeals, nor in conflict with other decisions by the court of appeals below.

The petition does not demonstrate a conflict between decisions of the various courts of appeal, or between decisions by the Court of Appeals for the Eighth Circuit, sufficient to warrant discretionary issuance of the writ of certiorari. Petitioner virtually concedes that the absence of an opinion by the court of appeals below renders it impossible to delineate the nature and scope of an alleged conflict between decisions of the Court of Appeals for the Eighth Circuit and decisions of courts of appeal in other circuits regarding enforcement of collective bargaining agreements and arbitration awards under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Respondents submit that the impossibility of such a determination is dispositive of the petition, requiring its denial. Unless a conflict of decisions can be demonstrated, it obviously should not be presumed. Indeed, under such circumstances, it should be presumed that the Court of Appeals for the Eighth Circuit applied the teachings of this Court in a manner consistent with decisions of other circuits.

Although petitioner relies heavily on the argument that the decision of the arbitrator conflicts with public policy (*e.g.*, Pet. Brief at 17, *et seq.*), that issue was not even addressed by the panel decision in petitioner's favor which the *en banc* decision reversed. *See,* Pet. Brief App. 9-14. Consequently, the record discloses no indication of the position of the Court of Appeals for the Eighth Circuit regarding the public policy argument advanced by petitioner. Thus, the cases relied on by petitioner to show a conflict between circuits regarding the alleged public policy issue are unavailing, because here the record does not disclose that the court of appeals below even addressed the public policy issue. Consequently, no conflict between circuits exists, and the petition should for that reason be denied.

Other cases relied on by petitioner to demonstrate the "belief" that the present case "would have been" decided differently in other circuits merely invoke rank speculation

regarding conflict, and are plainly distinguishable on their facts.

Respondents submit that any alleged conflict between decisions of the Court of Appeals for the Eighth Circuit does not constitute grounds for grant of certiorari because that conflict is an intra-circuit matter which should be resolved by the Eighth Circuit itself. *See, Davis* v. *United States,* 417 U.S. 333, 340, 94 S. Ct. 2298, 2302, 41 L. Ed. 2d 109 (1974). In addition, any apparent disparities in those decisions can be reconciled by differences in the underlying facts and contractual language involved in each case.

CONCLUSION

The petition for writ of certiorari should be denied because petitioners have not demonstrated that the decision below is in conflict with the decisions of this Court, that the decision below conflicts with the decisions of other courts of appeal, or that the decision below conflicts with other decisions of the Eighth Circuit itself.

Respectfully submitted,
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